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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant,

vs.

L. GEORGE BENJAMIN, As Insurance Commissioner of the State of South Carolina.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION

Joseph W. Henderson,
Douglas McKay,
Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Appellant,

vs.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

APPEAL FROM SUPREME COURT OF THE STATE OF SOUTH CAROLINA, ITS NO. 2628.

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, The Prudential Insurance Company of America, appellant herein, files this Statement, showing that this Court has jurisdiction upon appeal to review the judgment in question.

This is an appeal from a final judgment of the Supreme Court of the State of South Carolina in the cause of The Prudential Insurance Company of America v. D. D. Murphy,

as Insurance Commissioner of the State of South Carolina, No. 2628.

The appellant, a foreign insurance corporation, relying on the recent case of *United States* v. *Southeastern Underwriter's Association*, 322 U. S. 533, in which insurance business such as transacted by appellant herein was held to be interstate commerce, had requested the Insurance Commissioner of the State of South Carolina to issue to it a certificate of authority to do its business in said State during the forthcoming insurance year of 1945-1946 without the payment by appellant of South Carolina taxes based on a percentage of the insurance premiums received from appellant's insurance business in South Carolina during the preceding year, on the ground that the laws which impose said taxes, which were not imposed on domestic insurance companies, were unconstitutional since they violated Article I, Section 8, Clause 3 of the Constitution of the United States. The Insurance Commissioner, however, demanded the payment of said taxes. The appellant then filed its petition for injunction and equitable relief and obtained a rule on the Insurance Commissioner to show cause why he should not be enjoined and restrained from collecting said taxes and from revoking or suspending appellant's certificates of authority for its failure to pay said taxes. After a demurrer and a return to said rule and reply to said petition had been filed, argument was presented to the Supreme Court of the State of South Carolina, which Court in a per curiam opinion dismissed said petition, discharged said rule, dissolved the temporary restraining order theretofore issued, and denied a permanent injunction. A copy of the opinion, which is reported in — S. C., 35 S. E. (2d) 586, is appended hereto as Appendix "A". Subsequently L. George Benjamin, who in the meantime had succeeded D. D. Murphy as Insurance Commissioner, was

substituted in his official capacity of Insurance Commissioner in place of said D. D. Murphy as respondent, in said cause. Said substitution, which was made by appropriate order of the Supreme Court of the State of South Carolina, was permitted under the laws of the State of South Carolina, Sections 408 and 409 of the Code of Laws of South Carolina, 1942, (Volume I, Title 5, Chapter 14, pp. 250-252). See *Gorham Manufacturing Company* v. *Wendell*, 261 U. S. 1 (1922).

Basis of Jurisdiction

Section 237 of the Judicial Code (28 U. S. C. A. §344) gives jurisdiction for this appeal. It provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court of the United States by writ of error. By Act of January 31, 1928, C. 14 §1; 45 Stat. 54 (28 U. S. C. A. §861a) the remedy by appeal has been substituted for writ of error in such cases.

The State Statutes Involved

The statutes of the State of South Carolina, the validity of which are involved, are Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, (Volume 4, Chapter 157, Article 1, pp. 594-596). Said statutes provided, inter alia, that each foreign insurance corporation must annually pay taxes in the aggregate amount of three (3%) per cent of the premiums received from its insurance business in South Carolina during the preceding year, less minor reductions in the event of certain contingencies, and that domestic insurance corporations are exempt from said taxes.

Said Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, are appended hereto as Appendix "B".

The Date of the Judgment Sought to Be Reviewed and Date upon Which the Application for Appeal Is Presented.

The date of the final decision and judgment in the Supreme Court of the State of South Carolina is October 22, 1945.

The original judgment and decision of the Supreme Court of the State of South Carolina was rendered on September 13, 1945. Thereafter, and in apt time, The Prudential Insurance Company of America, appellant herein, filed a petition for rehearing with the Supreme Court of the State of South Carolina, and said petition for rehearing was denied by said Court on October 22, 1945.

The application for appeal, in support of which this statement is made, was presented on November 30th, 1945.

Finality of Judgment

The Supreme Court of the State of South Carolina is the highest Court in the State of South Carolina, and on its denial of the petition for rehearing its judgment became final. Article V, Sections 1 and 4, Constitution of State of South Carolina.

The Supreme Court of the United States has held that the date from which the time for making application for appeal begins to run is the date, if a petition for rehearing is filed, when the petition for rehearing is denied. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U. S. 448, 449.

Statement Showing That the Nature of the Case and of the Rulings of the Court Were Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

The appellant is a foreign insurance corporation which is doing an insurance business in all forty-eight states of the United States and elsewhere and which has been authorized to transact business in the State of South Carolina since 1897. Notwithstanding the recent decision in *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533, in which the business of insurance as transacted herein by the appellant was held to be interstate commerce, demand was made upon appellant for the payment of 1945 taxes based on three (3%) per cent of the premiums which it received from its insurance business in South Carolina during the preceding year, less minor deductions, as provided in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942. Petitioner further was advised that unless said taxes were paid, petitioner would be denied a certificate of authority to do insurance business in said state.

Petitioner then filed a petition for injunction and equitable relief in the Supreme Court of the State of South Carolina alleging, inter alia, that said statutes were unconstitutional in that they violated Article I, Section 8, Clause 3 of the Constitution of the United States as said taxes were a burden upon, interference with, and regulation of interstate commerce and also an illegal and unjust discrimination against foreign insurance companies, such as appellant, which were engaged in interstate commerce, and in favor of South Carolina domestic insurance companies which are not subject to said taxes or to any correlative or corresponding tax. The respondent filed a demurrer to said petition and a return to the rule to show cause and reply to said petition with the result that the said Court was only required to decide the question of law involved in this proceeding,

namely, are the aforesaid tax statutes repugnant to the Constitution of the United States.

The Supreme Court of the State of South Carolina decided in favor of the validity of said statutes and dismissed appellant's petition for injunction and equitable relief.

Specification of the Stages in the Proceedings and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The federal questions sought to be reviewed were raised by the appellant at the very inception of the proceedings and at every appropriate time thereafter.

In appellant's petition for injunction and equitable relief it was specifically alleged in paragraph 9 that the business of the appellant is and has been interstate commerce and in paragraphs 12 and second prayer of said petition that said statutes under which said "premium taxes" are imposed are in violation of Article I, Section 8, Clause 3 of and Fourteenth Amendment to the Constitution of the United States, as more fully developed in said petition.

The respondent joined issue on the federal question of the constitutionality of said tax statutes and in said demurrer pleaded in support thereof Public Law No. 15, 79th Congress (Chapter 20, 1st Session) known as the McCarran-Ferguson Act which provided, inter alia, that "the business of insurance * * * shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

In respondent's return to the rule to show cause and reply to petition, the respondent in the second paragraph denied that the conduct of appellants' business constituted interstate commerce; in the fourth and fifth paragraphs denied that there is any illegal discrimination against appellant; and in the fourth paragraph not only denied any illegal discrimination but also denied that the taxes create

a burden upon interstate commerce, and, in addition, alleged therein that said tax statutes are valid by reason of the aforesaid McCarran-Ferguson Act.

The federal question concerning the constitutionality of Public Law No. 15 was immediately raised by the appellant in its brief and argument in which it took the position that, if interpreted as contended for by the respondent, Public Law No. 15 would be unconstitutional.

All the federal questions thus raised were fully argued in petitioner's (appellant herein) Brief and Reply Brief (Petitioner's Brief, pp. 1, 12-65; Petitioner's Reply Brief, pp. 1-9) and in Respondent's (Appellee herein) Brief, pp. 5-20, 22-24).

In its opinion dismissing appellant's petition for injunction and equitable relief, the Supreme Court, which failed to hold specifically that the insurance business of the appellant, conducted in the manner and extent established in this proceeding, was interstate commerce within the meaning of the "commerce clause" expressly held that the statutes which imposed said "premium taxes" were constitutional and not in violation of the commerce clause. (See opinion attached hereto as Appendix "A"; — S. C. —, 35 S. E. (2d) 586.)

The issue of unconstitutionality of said state statutes was again raised in appellant's petition for rehearing, which petition was denied by said Court.

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

This appeal presents to the Court a most important constitutional question which directly affects the business of insurance throughout the United States, and which, although recognized in the recent case of *Lincoln National Life Insurance Company* v. *Read*, — U. S. —, 89 L. Ed. 1250

(1945), has not heretofore been decided by the Supreme Court of the United States.

Prior to 1944 numerous states, including South Carolina, had enacted statutes imposing a tax on foreign insurance companies based on a percentage of the premiums received therein during the preceding year without subjecting domestic insurance companies to the same tax or a corresponding or correlative tax.

The decision in *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533 (1944) holding that an insurance company which conducts a substantial part of its business across state lines is engaged in interstate commerce and subject to regulation by Congress under the "commerce clause", immediately raised the grave and important question as to the constitutionality of said discriminatory "premium tax" statutes including the statutes involved herein, i. e., Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942.

The insurance companies in general, such as the appellant, which transacts its business in all forty-eight states, and mostly across state lines, have in the past, prior to the case of *United States* v. *Southeastern Underwriters Association, supra*, paid very substantial taxes in states, like South Carolina, whose taxing statutes now place a burden on interstate commerce by not taxing domestic insurance companies on the same basis and thereby unjustly discriminating against foreign insurance companies.

The sum total of appellant's 1945 tax in sixteen states [1]

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[1] Alabama ($54,390.85); Florida ($110,994.78); Illinois ($1,127,714.07); Indiana ($452,357.44); Kansas ($102,660.15); Kentucky ($124,751.13); Michigan ($470,160.35); Mississippi ($9,393.09); Nebraska ($56,986.97); North Dakota ($1,458.36); Ohio ($1,186,159.22); Oklahoma ($109,624.89); Pennsylvania ($1,881,670.73); South Carolina ($19,676.94); Texas ($32,306.80); and Wisconsin ($332,049.51). The amounts appearing after the names of each state represent the 1945 *tax* on premiums received by the appellant during the preceding year.

whose taxes place a burden on interstate commerce (exclusive of the other thirty-two states where the tax is either questionable or nondiscriminatory) amounts to $6,072,355.28.

As practically all other insurance companies transact business in states other than that in which incorporated and are consequently subject to similar discriminatory taxes, which appellant estimates amounts to approximately $32,900,000.00 per year in the said sixteen states, it is evident that from a monetary point of view alone the questions raised herein are not only substantial but vitally affect the entire insurance business in the United States, as well as the fiscal operations of the respective states.

Furthermore, the questions involved herein require a final adjudication by the Supreme Court of the United States. Numerous cases in various states are pending in which the constitutionality of similar "premium tax" statutes is being litigated not only by the appellant but also by many other insurance companies. A decision in this case, therefore, would greatly assist in deciding similar questions in such other cases if, in fact, it would not control them.

It is most important to the appellant and all insurance companies that, if possible, a final decision be rendered on these questions prior to the time in 1946 when they will be required to engage in additional litigation contesting the validity of 1946 premium taxes.

The questions raised herein are of the greatest importance.

Is the insurance business of the appellant [2] which radiates and is conducted from its Home Office at Newark, New Jer-

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[2] On December 31, 1944, the Company had in force 33,933,077 policies insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075.00; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000.00 on such lives. During the year 1944 the

sey, with all its "interrelationship, interdependence and integration of activities in all the states" interstate commerce?

Is not the "premium tax" imposed upon appellant by the State of South Carolina a direct and unreasonable burden upon, interference with, and regulation of interstate commerce and a violation of the "commerce clause" of the Constitution of the United States as interpreted by numerous decisions of the Supreme Court of the United States?

Is not said "premium tax" an illegal discrimination against the appellant, a foreign insurance corporation, engaged in interstate commerce and in favor of domestic insurance corporations which are not subject to any corresponding, correlative, equivalent or similar tax or taxes?

What was the intent of Congress in enacting Public Law No. 15, 79th Congress, Chapter 20, 1st Session (known as the McCarran-Ferguson Act)? What effect, if any, was it intended to have on existing state discriminatory "premium taxes" and to what extent was Congress constitutionally able to so legislate? Certainly Congress has no authority to levy a tax in a particular state for the benefit of that

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Company issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022.00 and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000.00 on such lives. During the year 1944 the Company collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45. While applications for insurance policies, policy loans, etc., are received by agents operating in the various states, all applications and reports are transmitted to the Home Office in Newark, New Jersey, where they are considered and acted upon and where all contracts are executed and issued. Furthermore, investments of the company are controlled by the Board of Directors at Newark, N. J., where the executive office are also located. However, by the use of the channels of interstate commerce (by mail, telegraph, telephone, radio, vehicles of transportation, etc.) the company is able to conduct its insurance business throughout the United States. For details and the extent of appellant's business, see paragraphs 4 to 9, inclusive, of appellant's Petition for Injunction and Equitable Relief.

state, nor does Congress have authority to adopt as its own a state law which it could not constitutionally enact. Congress has no authority to authorize the State of South Carolina to levy a three (3%) per cent tax on foreign insurance companies, but, if the interpretation placed on Public Law No. 15 by the Supreme Court of the State of South Carolina is permitted to stand, the effect is to delegate to the state authority which Congress itself does not possess.

These momentous questions which have been raised in this case can only be satisfactorily answered by a review by the Supreme Court of the United States and its decision thereon.

Finally, the attention of the Court is directed to the fact that twelve states [3] of twenty-eight states whose "premium tax" statutes as of January 1, 1945, in appellant's opinion placed a burden on interstate commerce have recently enacted legislation which either completely or practically eliminates the aforesaid "premium tax" discrimination, and three states [4] have enacted legislation which purports to eliminate said discrimination but, in the opinion of the appellant, does not actually do so. Thus, it is evident that these various legislatures not only have recognized the importance of those same constitutional questions which are raised herein but by the enactment of new legislation have impliedly acknowledged the unconstitutionality of their respective previous "premium tax" statutes and now in twelve states (see footnote 3, *supra*) do not permit any discrimination in premium taxes between their own domestic and foreign insurance corporations.

State legislatures in some states have voluntarily done what should be required of all state legislatures through

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[3] Arizona, Arkansas, Iowa, Maine, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, Washington and West Virginia.

[4] Florida, Oklahoma and Texas.

a decision of the Supreme Court of the United States holding discriminatory "premium tax" statutes, like that of the State of South Carolina, unconstitutional.

Cases Believed to Sustain Jurisdiction.

As to the proposition that appellant's insurance business is interstate commerce:

United States v. *Southeastern Underwriters Association*, 322 U. S. 533 (1944).

As to the proposition that said South Carolina "premium tax" is unconstitutional in that it constitutes a direct and unreasonable burden upon, interference with, and regulation of interstate commerce:

Crutcher v. *Commonwealth of Kentucky*, 141 U. S. 47 (1891);

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90 (1937);

Fisher's Blend Station Inc. v. *Tax Commission*, 297 U. S. 650 (1936);

As to proposition that said South Carolina "premium tax" is unconstitutional in that it illegally discriminates against foreign insurance corporations engaged in interstate commerce and in favor of domestic insurance corporations not subject to said tax or any corresponding or correlative tax:

Welton v. *Missouri*, 91 U. S. 275 (1876);

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935);

Hale v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939);

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, 46, 48 (1940);

Hinson v. *Lott*, 8 Wall. 148 (1868);

Henneford v. *Silas Mason*, 300 U. S. 577 (1937).

As to the proposition that Public Law 15 (McCarran-Ferguson Act) was not intended to permit, nor could it legally permit, discriminatory regulation or taxation of interstate commerce:

Welton v. *Missouri*, 91 U. S. 275 (1876);
Robbins v. *Shelby Taxing District*, 120 U. S. 489 (1887);
Scott v. *Donald*, 165 U. S. 58 (1897).

Conclusion

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

Respectfully submitted,

JOSEPH W. HENDERSON,
1910 Packard Building,
Philadelphia 2, Pa.,

DOUGLAS MCKAY,
Carolina Life Building,
Columbia, South Carolina,
Attorneys for Appellant.

APPENDIX "A"

THE STATE OF SOUTH CAROLINA, IN THE SUPREME COURT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

In the Original Jurisdiction

Case No. 2628
Opinion No. 15773
Filed September 13, 1945

PETITION DISMISSED

McKay & McKay, of Columbia, for petitioner.
John M. Daniel, Attorney General, M. J. Hough and T. C. Callison, Assistant Attorneys General, all of Columbia, for respondent.

Per CURIAM:

For a great many years, perforce the decision of the Supreme Court of the United States in Paul vs. State of Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, the transaction of the business of insurance across state lines was not interstate commerce and, therefore, was not subject to the control of Congress. 29 Am. Jur., Insurance, Sec. 35. This longstanding status was upset by the result of the recent case of United States vs. Southeastern Underwriters Ass'n., 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440. Overruling the earlier case, the latter held that when the insurance business crosses state boundaries, it is interstate commerce. Because of the complexities and colossal nature of this far-flung business, it was feared in many quarters that considerable chaos might result from the departure of the

Southeastern Underwriters decision from the former rule, but for an Act of Congress which was soon thereafter passed.

The latter is known as the McCarran Act, passed February 27, 1945, Public Law, 15, 79th Congress. The portions pertinent to the present controversy are set out below:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Unquoted Sections 3 and 4 preserve the applicability of certain provisions of the Sherman Act and the applicability of the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act.

The Prudential Insurance Company of America is in this State a "foreign" life insurance company, that is, it is in-

corporated under the laws of New Jersey and its home office and the bulk of its property are located in the city of Newark in that State. However, it has solicited business and sold insurance contracts and policies to residents of South Carolina since the year 1897. At the end of 1944 it had in force in this State 26,373 policies insuring the lives of about twenty thousand persons for amounts aggregating over thirty million dollars; and paid claims in that year of $457,602.28 on policies covering the lives of South Carolinians. (In the face of these figures it does not appear that the tax law now resisted was "hostile in conception" or is "burdensome in result",—the words of Mr. Justice Cardozo in Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032.)

The Company brought this action in the Original Jurisdiction of this Court, by permission, in attack upon the validity of the License tax of three per cent which it has heretofore paid on premiums collected here, under the provisions of the present Sections 7948 and 7949 of the South Carolina Code of Laws of 1942. While the tax is a flat one, as indicated, it is subject to a graduated reduction in proportion to the amount of certain financial investments which the company may make and report in the State of South Carolina.

It is not contended that the latter or any other feature of the law under attack is discriminatory against petitioner as compared with any other member of the class to which it belongs, to wit, "foreign" insurance companies. But it is alleged that this tax which has before been paid without protest by petitioner has become invalid, and therefore unenforceable, by reason of the law declared in the Southeastern Underwriters case, supra, in view of the Federal constitutional authorization of Congress to regulate commerce among the states, and the many decisions of the Federal Courts thereabout. It is also alleged in the petition that the tax violates a section of our State Constitution, but the point was not argued and is, therefore, deemed to have been abandoned in accord with the established rule.

Petitioner presents a two-pronged attack, first that the tax constitutes a burden upon its interstate business, transacted in part within the state, and, second, that it is discriminatory against petitioner for it is not applicable to insurance corporations of the state, domestic companies, which are exempted from the law's provisions. The respondent, the Insurance Commissioner of the State and charged with the enforcement of the law, first contends that the proceeding is really against the State itself, which is immune from suit without its express permission. His demurrer and return also raised the other issues which will be discussed.

Disposition will be first made of the point of the respondent that the action is not maintainable because it is in reality against the State, without its permission, and, therefore, in violation of its sovereign immunity from suit. This is foreclosed by former pronouncements of this Court, in view of the fact that there is no adequate remedy at law, such as payment of the taxes under protest and suit for recovery, if they are illegally assessed. It was said in Santee River Cypress Co. vs. Query, 168 S. C. 112, 167 S. E. 22, as follows: "It is not only within the power of a Court of equity, but the duty rests upon it, to enjoin the collection of an illegal tax in those cases where no adequate legal remedy is provided for the aggrieved taxpayer. Ware Shoals Mfg. Co. vs. Jones, 72 S. C. 211, 58 S. E. 811." The eleventh amendment to the Federal Constitution, attempted to be invoked by respondent, is expressly applicable only to the Courts of that jurisdiction. Federal Land Bank of Columbia vs. State Highway Department, 172 S. C. 174, 173 S. E. 284. State of Missouri vs. Fiske, 290 U. S. 18, 54 S. Ct. 18, 17 L. ed —.

We proceed then to the heart of the controversy. It is the clear intent of Congress to refrain for the present from the regulation and taxation of insurance, even as to the activities of it which undoubtedly constitute interstate commerce under the authority of United States vs. Southeastern Underwriters Ass'n, supra, with the exceptions hereinabove noted.

It would be difficult, if not impossible, to compose clearer statements than are contained in Sections 1 and 2 (a) of the McCarran Act, which are quoted again for emphasis:

> "Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax which petitioner resists for the first time, and so far apparently alone among the many nonresident insurance companies operating in the state, may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a "foreign" company, such as petitioner, had in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies. It does not appear in the record whether the state of New Jersey, has a similar license tax to that of South Carolina (applicable to our and other nonresident insurance companies which may do business there) to which petitioner now objects, but the tax is not at all

uncommon among the states. Annotations, 49 ALR 726, 77 ALR 1490 and 83 ALR 464.

Thus, upon the showing made, there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the tax laws of this state, to which it is subject in the conduct of its business here.

Turning to the gravamen of the complaint, that the tax being upon interstate commerce is *ipso facto* a burden thereon, irrespective of discrimination, we see no reason on the record or in argument to hold that it was not intended to be included by Congress in the "taxation by the several states of the business of insurance", which the McCarran Act declared is in the public interest and directed that the insurance business should continue to be subject thereto.

Congress is authorized by the Constitution of the United States to regulate commerce between the states. The words of that great document are quite plain thereabout, as follows: "The Congress shall have power * * * (3) To regulate commerce with foreign nations, and among several States, and with the Indian tribes." Art. 1, par. 8.

We are unable to see therein any obstacle to the course of Congress in deliberately refraining from regulation of any particular field of interstate commerce, which course is clearly charted by the McCarran Act insofar as regulation by taxation of the insurance business is concerned, unless a necessity for uniformity should require the desistance of the states. We are unable to perceive the latter condition with respect to the taxation of insurance companies. Certainly they have thriven under the existing system of state taxation. The staggering figures in the record in this case, indicating the gigantic size of petitioner's business, prove it.

It is repeated for emphasis and clarity that there is no apparent neces ity for uniformity of the rate of the premium receipts tax of the various states which would invalidate (on that account alone) state legislation upon the subject, which lies in a field deliberately and advisedly unoccupied by Congressional legislative action. Kelly

vs. State of Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3. It might with equal reason be contended that the property tax assessments and rates should be the same in all states, which we think has never been proposed. See, for lack of a federal question in such a tax (at the time of that decision), Continental Assur. Co. vs. Tennessee, 311 U. S. 5, 61 S. Ct. 1, 85 L. Ed. 5.

There is a very long-standing precedent for the propriety and efficacy of the McCarran Act. It is found in Cooley vs. Port Wardens, 12 How. (U. S.) 299, 13 L. Ed. 996. There one of the major questions was the validity of a law of Pennsylvania fixing pilotage fees (the proceeds of which were applied to the relief of indigent local pilots and their dependents) affecting ocean shipping in interstate commerce. At the first session of Congress it was enacted on Aug. 7, 1789 (1 Stat. at Large 54) that pilots should be under the regulations of the state laws, present and future, until further legislation by Congress. Upon the strength of the latter, the local law was upheld and the Court expressly said that the grant of commercial power to Congress (the commerce clause) does not contain any terms which exclude the states from exercising authority over its subject matter. The principle of this decision is stated in the modern text of American Jurisprudence, Vol. 11, p. 18, as follows: "Strictly speaking, Congress cannot delegate to the states its power over interstate and foreign commerce. However, there the subject is one upon which the states have the power to legislate in the absence of action by Congress, it may validly be provided by Congress that state statutes shall be controlling." And see the approving citation of it in the Minnesota Rate Cases (Simpson vs. Shepard) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729, 48 L. R. A. 1151, Ann. Cas. 1916A, 18.

The author of the opinion of the Court in United States vs. Southeastern Underwriters Ass'n, supra, pointed the way to the course thus far followed by Congress when he said:

> "Another reason advanced to support the result of the cases which follow Paul vs. Virginia, has been that, if any aspects of the business of insurance be

treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this Court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be interstate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the State and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

From one of the supporting cases cited by the Court for the foregoing, New York Life Ins. Co. vs. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332, the following is quoted:

"There are cognate cases to the cited cases, of contracts incident to commerce, but not of themselves commerce. In Williams vs. Fears, 179 U. S. 270, 45 L. Ed. 186, 21 Sup. Ct. Rep. 128, there was levied by the state of Georgia a tax upon each emigrant agent or employer or employee of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the commerce clause of the Constitution of the United States. Commerce was defined, quot-

ing Mr. Justice Field, in Mobile County vs. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238, 241, to 'consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' The Court considered the definition comprehensive enough for the purpose of the case, and, testing its application, said, by Mr. Chief Justice Fuller: 'These agents were engaged in hiring laborers in Georgia, to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation.' The conclusion was supported by cases, among others, Paul vs. Virginia and Hooper vs. California. On the authority of the same cases and New York L. Ins. Co. vs. Cravens, in Ware and Leland vs. Mobile County, 209 U. S. 405, 52 L. Ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, it was held that contracts by brokers for the sale of cotton for future delivery, where the transactions were closed by contracts completed and executed in one state, although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not 'the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company.'

"In Engel vs. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. It was attacked as a violation of the commerce clause of the Constitution. The case was decided to be similar in principle to Ware & Leland vs. Mobile County and Williams vs. Fears; and the law was sustained."

In the dissenting opinion of the Chief Justice to the judgment of the majority in the Southeastern Underwriters

ase, he emphasized the confusion and conflict (between national and state jurisdiction) which he anticipated; but the most that he said concerning "state taxes which may now be thought to discriminate against the interstate commerce" (his words) was that they would be of seriously doubtful validity. And this was, of course, before the important enactment of Congress of the McCarran law, which was manifestly intended to allay such fears and doubts by temporarily, at least, removing the grounds of them.

The old, but leading, case of Crutcher vs. Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649, contains the significant statement in the opinion that is emphasized in the following quotation:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, *unless Congress should see fit to interpose some contrary regulation on the subject.*"

In this instance Congress has seen fit to interpose, and has interposed, a "contrary regulation on the subject" by passage of the McCarran Act which is quite simple in its effect, that is, that for the present the regulation (with certain now irrelevant exceptions) and taxation of the interstate business of insurance shall continue by the states. The Act goes further, that any possible doubt may be removed, by the inclusion of the provision to the effect that there is no silence of Congress which might be construed to mean that this form of interstate commerce should go on without regulation or any state legislation which might be held to be a burden upon it and, therefore, in conflict with the Commerce clause of the Constitution.

Congress has plenary power over interstate commerce and we know of no legal obstacle to the exercise of it embodied in the McCarran Act. "Since the commerce clause of the Federal Constitution is not a limitation upon the

power of Congress, a statute enacted by Congress, for the District of Columbia, imposing a tax upon the privilege of doing business within the district, is not subject to the objection that it interferes with or is a burden upon interstate commerce. General Electric Co. vs. District of Columbia (1940) 71 App. D. C. 321, 110 F. (2d) 264; Colgate Palmolive Peet Co. vs. District of Columbia (1940) 71 App. D. C., 324, 110 F. (2d) 264. Both of these decisions followed Neild vs. District of Columbia (1940) 71 App. D. C. 306, 110 F. (2d) 246, which involved a copartnership rather than a foreign corporation." 139 A. L. R. 951.

The brunt of petitioner's argument has been answered in what has been said, but it is incidentally also contended that the application of the tax to the premiums received by petitioner upon its South Carolina business violates the equal protection and due process clauses of the Fourteenth Amendment to the Federal constitution (which are also embraced in Art. 1, Sec. 5 of our State Constitution). But, in any view of it, it does not, under the decisions of the United States Supreme Court. There need only be cited the current case of Lincoln Nat. Life Ins. Co. vs. Read, —— U. S. ——, 65 S. Ct. 1220, —— L. Ed. ——, which was decided during the pendency of this proceeding.

Report of the latter case discloses that the State of Oklahoma levies a premium tax on foreign life insurance companies, similar to the tax questioned in the case at bar, imposed by the State Constitution, and the legislature increased the tax to four per cent. The plaintiff in the action was an Indiana corporation and resisted payment upon the ground that the assessment was discriminatory, because not applicable to domestic insurance companies, and is, therefore violative of the Fourteenth Amendment. The Court made short shrift of the contention and upheld the tax. Question was there also raised concerning a point not involved in the instant contest, to wit, that the plaintiff company was admitted to do business in the state before the statutory increase of the tax, which was, therefore, not legally applicable to it. (Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494, 47 S. Ct. 179, 71 L. ed. 372, 49 ALR 713.) The Court also overruled this contention, upon facts similar to those of our case. But, as already stated, that point

is not made in the present proceeding. It appears that the position was not taken in that case that the plaintiff was engaged in interstate commerce, and the question was not discussed, but the case was decided long after the decision in the Southeastern Underwriters Ass'n. case, *and also after the passage of the McCarran Act.*

Also decided after the Southeastern Underwriters Ass'n case, but apparently before the McCarran Act, was First Nat. Ben. Soc. vs. Garrison, 58 Fed. Supp. 972, in which the plaintiff, an Arizona company, challenged the validity of the California statute regulating the conduct of the insurance business in that state. Taxation was not involved but the lengthy opinion is enlightening upon the subject of the status of the law after the adjudication by the Supreme Court (in the Southeastern Underwriters case) that insurance is commerce, interstate where it crosses state lines, and in the absence of Congressional legislation. State regulation was upheld.

One of the postulates set forth in the Garrison decision, number two, is as follows: "It is a well established principle that Congress may circumscribe its regulation of interstate commerce and occupy a limited field * * *." (It is very clear to us that Congress has expressly circumscribed its regulation of the interstate business of insurance by the enactment of the provisions of the McCarran Act.) Cited with approval was another of the utterances of the Chief Justice in his dissenting opinion in the Southeastern Underwriters case (not at all, however, in conflict with the leading opinion) to the effect that the judgment of the Court in the latter case nowhere gave the slightest intimation that all state laws governing insurance companies were rendered *ipso facto* void but that such matters would have to be decided by a case-to-case determination with consideration of all the respective relevant facts and circumstances; and the California District Court concluded (and this was before the McCarran Act) that it is conceivable that as Congress legislates on insurance, state laws will fall, but only to the extent that they are supplemented (supplanted?) by Federal legislation, and that in the meantime state statutes will continue to control. There were further copius quotations

from the opinion of Mr. Chief Justice Stone, with which this opinion need be extended.

Upon the factual consideration aforementioned and the legal grounds stated, the petition is dismissed, the rule discharged, the temporary restraining order (heretofore issued) dissolved and permanent injunction denied.

D. Gordon Baker, *C. J.*,
E. L. Fishburne, *A. J.*,
T. H. Stukes, *A. J.*,
C. A. Taylor, *A. J.*,
G. Dewey Oxner, *A. J.*

APPENDIX "B"

Sections 7948, 7949 of the Code of Laws of South Carolina, 1942, Volume 4, Chapter 157, Article 1. (pp. 594-596)

Section 7948. *Semi-annual license fees to be paid—returns of premiums collected.* In addition to the annual license fees now provided by law, the commissioner shall require each foreign life insurance company of any class licensed by him not incorporated under the laws of the State of South Carolina, except fraternal benefit orders operating under the grand lodge system, to pay as an additional and graded license fee an amount equal to two per centum on the total premiums, i.e., total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this State during the time the company has done business in this State since making last such return. Such returns shall be made under oath by an executive officer of the company: Provided, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the reserve on all policies issued in South Carolina is invested in any or all of the following securities or property, to-wit: notes or bonds of the State of South Carolina or of counties or municipalities of the

State or of sub-divisions thereof; or first mortgage bonds of real estate in this State; or first mortgage bonds of solvent domestic or domesticated corporations whose improved property is situate entirely within this State and which are owned and controlled independently of foreign corporations and operated entirely within the State; or average daily balance on deposits in banks of this State maintained continuously for six months next preceding date of such return; or any property situate within the State and returned for taxes therein, at the value at which it is returned, then, and in that case, the additional license fee on premiums collected during the time such investments have been actually made and maintained shall be one and three-fourths per centum; under like conditions, if said investments be one-half of said reserves, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said reserve, the additional license fee shall be one and one-fourth per centum, and if the entire reserve be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent. In addition to the annual license fee now provided by law, the insurance commissioner shall require each foreign fire insurance company, each foreign accident and health, each foreign casualty or surety company, and all other companies of any class licensed by him, not incorporated under the laws of the State of South Carolina not hereinbefore specifically mentioned to pay as an additional and graded license fee an amount equal to two per cent, on the total premiums, i.e., total income or total receipts from the State, less return premiums for cancellation on risks in this State during the time the company has done business in this State since last such return. Such returns shall be made under oath by an executive officer of the company; Provided, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the premium receipts on all risks in South Carolina is invested in the securities named in this section, then, and in that case, the additional license fee on premiums collected during the time such investments have been actually made and sustained shall be one and

three-fourths per centum; under like conditions, if said investments be one-half of said premium receipts, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said premium receipts, the additional license fee shall be one and one-fourth per centum; if the entire premium receipts be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent: Provided, Further, that one-half of the said additional license fee collected under the terms of this section is allotted to the several counties, respectively, in proportion to said premiums collected in said counties, and the same is hereby appropriated to ordinary county purposes, and no additional license fee or county tax shall be levied on such companies. At the close of the semi-annual period, or as soon thereafter as possible, the insurance commissioner shall furnish the state treasurer a statement showing the amount of said premiums collected by each company in each of the several counties of the State, and the amount of additional license fees collected thereon; and the state treasurer, upon a warrant from the comptroller general, shall pay into the county treasury of each county one-half of the additional license fee collected as aforesaid on the said premiums collected by each insurance company in that county: Provided, that nothing in this article or any other article shall be construed as preventing any municipality from levying and collecting license fees or taxes in accordance with its ordinances. The return of said premium collections shall be made within thirty days after the 30th day of June and the 31st day of December of each year, and if the returns are not so made, the insurance commissioner may suspend the license of the company until such returns are made. The attorney general shall bring suit in the name of the State to collect any unpaid portion of license fees provided herein.

Section 7949. *Additional annual license fee.*—The Insurance Commissioner of South Carolina is hereby directed to require all insurance companies doing business in this State, including all domestic companies and all other companies of any class licensed by such insurance commissioner and

This question should not be summarily decided on a motion to dismiss or affirm. Similar statutes in other states are presently being litigated not only by Appellant but by other insurance companies. A decision in this case will greatly assist in deciding similar questions in other cases, if, in fact, it would not control them. Therefore, this question merits the complete development and presentation which can only be obtained by full argument and review on appeal.

We, therefore, submit that your Honorable Court should deny the Motion to Dismiss or Affirm and should take jurisdiction of this appeal.

Respectfully submitted,

JOSEPH W. HENDERSON,
DOUGLAS MCKAY,
Attorneys for Appellant.

not incorporated under the laws of South Carolina to pay, in addition to the annual license fee, now provided by law, a graduated license fee in an amount equal to one (1%) per cent of the total premiums collected in the State, less return premiums for cancellation on risks: Provided, that the terms hereof shall not apply to domestic insurance companies; and Provided, Further, that mutual fire insurance companies of other States, admitted to do business in this State, employing no agents, writing no business except on the property of its members, and doing business without profit shall pay annually on or before the first day of March, in addition to all other license fees which they are now required by law to pay, a graduated annual license fee in an amount equal to one (1%) per centum of the premiums and premiums deposits and assessments collected by them in the State during the year ending on the thirty first day of December next preceding, after deducting from such premiums and premium deposits and assessments the so called dividends or unused or unabsorbed portion of the premiums and premium deposits and assessments applied or credited in part payment of such premiums or premium deposits and assessments or returned to policyholders in cash or otherwise during the year for which the said tax is computed.

The one (1%) per cent fee as provided for in the preceding paragraph shall be paid into the state treasury for state purposes, and the insurance commissioner of South Carolina is hereby required to collect said fee as other fees are collected and pay over to the State treasurer.

This section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws, but it is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for state purposes.